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MUNICIPAL CONTRACTS AND THE REGULATION OF RATES.

A STREET railway company, a gas or electric light company, a telephone or water company, and all similar companies, must ordinarily, in order to operate within the limits of a city, first obtain the consent of the proper municipal authorities for the necessary use of the public streets. A contract between the city and the company or individual engaging in such business is usually the result. The company makes certain promises, agrees to certain conditions with respect to the conduct of its business, in consideration of the grant to it of a right to use the streets, and of possible promises and undertakings on the part of the city. Very commonly the rates to be charged for the services offered by the company to the city or its inhabitants are made the subject of an express provision in the contract, and it is proposed in this article to deal with the various questions arising with reference to such rate provisions contained in municipal contracts.

The scope and effect of such provisions as to rates will depend not only upon the form of the agreement with reference thereto contained in the contract, but upon the power and authority of the city to deal with the question of rates to be charged by persons engaged in a public service business. In the first place, it may be that no express power to deal with the subject of rates has been granted to the city by the legislature. In such case, what would be the effect of an agreement as to rates contained in a contract

between a city and a public service corporation? Secondly, if an express power to legislate upon the subject of rates were granted to the city, might that be regarded as in some respects excluding the power to contract, and if so, what effect would that have upon a contract as actually made? And then, thirdly, what may be the scope of such a contract in a case where the city has been delegated a general power to regulate rates, and has been authorized also to contract with reference thereto? It is proposed to consider the cases with respect to the three different powers thus lodged in the municipality.

I.

A city may lawfully exercise only those powers which the state legislature has seen fit to confer upon it, and it has been very generally held that the power to regulate the use of the streets does not include a general power to regulate from time to time the rates to be charged the public by persons and corporations permitted to use the streets and alleys of a city for the conduct of a public service business.[1] That does not prevent the city, however, from including in an ordinance granting to a public service company a right to use the streets, some provision upon the subject of rates.

In the first place, it must be borne in mind that no power to legislate upon the subject of rates is required to enable the city to contract and agree upon a price for water or gas or a telephone service to be furnished to the municipal corporation itself. If the city have power to supply itself with any of these things the absence of a power to legislate generally upon the subject of rates does not prevent the city from agreeing upon the price it will pay for services agreed to be rendered to the municipal corporation. Over what period of time the city may be authorized to bind itself by contract to pay an agreed price for a particular service is a totally different question from the right of the city to contract with reference to a legislative power to regulate rates. As we shall see later, this plain distinction between two separate municipal powers has been frequently lost sight of, especially where a pro-

[1] St. Louis *v.* Bell Telephone Co., 96 Mo. 623; *In re* Pryor, 55 Kan. 724; Wabaska Electric Co. *v.* Wymore, 60 Neb. 199; State, *ex rel.* Wisconsin Telephone Co. *v.* City of Sheboygan, 111 Wis. 23, 37–40; Lewisville Natural Gas Co. *v.* State, 135 Ind. 49; City of Noblesville *v.* Noblesville Gas and Improvement Co., 157 Ind. 162; Old Colony Trust Co. *v.* Atlanta, 83 Fed. Rep. 39.

vision as to the price to be paid by the city, and a provision as to rates to be charged private users or consumers, are included in a single contract.

If a municipal corporation has been given authority to supply its own need for water or gas, it must, in the absence of some express limitation, have power to agree upon the price to be paid. No express power to pay for what the city is authorized to buy can be required. Having the power, the city's contract in this respect would stand upon the same footing as a contract made between an individual and the company, and the obligation of the city to pay the agreed price would be protected by the Constitution of the United States from impairment by any subsequent exercise of the legislative power of the state, either by state legislature or city council.[1]

Furthermore, although possessing no general power to regulate rates, the city may nevertheless include, as a condition of the ordinance, some provision as to the rates to be charged the inhabitants of the city. In consideration, that is, of its grant of a right to use the public streets, the city may, if possible, obtain some concession on the part of the company with reference to rates, — a promise, for instance, that the company will not, during the term of the contract, charge more than a certain rate for the services it proposes to offer. Such a provision as to rates would obtain its whole force and effect by virtue of its contractual character, as an obligation assumed, for good consideration, by the company. This is clearly stated in a recent case in Indiana.[2] The supreme court there says: —

"The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to consumers. But it was under no compulsion to convey such right to

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[1] Bellevue Water Co. *v.* Bellevue, 35 Pac. Rep. 693 (Idaho); Reed *v.* City of Anoka, 88 N. W. Rep. 981 (Minn.); Agua Pura Co. *v.* Mayor of Las Vegas, 60 Pac. Rep. 208 (New Mexico).

Whether in such case the subsequent act of the city council should be regarded as a law impairing the contract, or merely as an act of the city in the nature of a breach or repudiation of the contract, might often be a question. Hamilton Gas Light Co. *v.* Hamilton City, 146 U. S. 265. But see American Waterworks & Guarantee Co. *v.* Home Water Co., 115 Fed. Rep. 171; Anoka Waterworks Co. *v.* City of Anoka, 109 Fed. Rep 580; Little Falls Electric & Water Co. *v.* City of Little Falls, 102 Fed. Rep. 663.

[2] City of Noblesville *v.* Noblesville Gas & Improvement Co., 157 Ind. 162, 169.

See to the same effect: Westfield Gas and Milling Co. *v.* Mendenhall, 142 Ind. 538, 544, Zanesville *v.* Gaslight Co., 47 Oh. St. 1, 31.

any one. The subject of grant rested in contract, like any other matter. As the price of the right, the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. . . . That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract; and the power to regulate as a governmental function, and the power to contract for the same end, are quite different things."

The agreement on the part of the company in such a case might even be to charge not more than the city might from time to time determine, and the reservation by the city in such a contract of a right to regulate rates might be given that interpretation; but the force of an act of the city fixing the rates to be charged by that particular company would depend, under such circumstances, upon the right so given by the contract.[1] It would not have the effect of legislation. The company could not by contract enlarge the legislative powers of the municipality.

As the contract in such a case is made by the city in the absence of, and therefore without reference to, any legislative power over the subject of rates, it follows that the existing legislative power of the state is not bound so that it may not subsequently be exercised to reduce the maximum named in the contract. The only existing contract obligation with regard to rates is the obligation imposed upon the company not to charge more than the agreed maximum. There is no agreement that the company may charge at least that amount. No obligation to pay the maximum rates was assumed by the inhabitants of the city, nor was any obligation not to alter those rates imposed upon the state legislature, by the promise of the company to charge no more than the rates named in the contract. The state, therefore, in such a case may afterwards legislate so as still further to limit the rates which such corporations may charge the general public without rendering such act open to the objection of impairing the obligation of the contract as to rates made between the city and the particular corporation.[2] And if the contract provision as to the rates to be charged the municipal corporation itself is of the same character, establish-

[1] Compare the reservation contained in Los Angeles *v.* Los Angeles City Water Co., referred to *infra.*

[2] City of Indianapolis *v.* Navin, 151 Ind. 139, 142.

ing a maximum charge merely, and not amounting to an agreement on the part of the city to pay a certain amount, then the city also may claim the advantage of a subsequent legislative reduction of rates.[1] It follows also that, as the rate provision is merely a contract obligation binding as such upon the company, and not binding upon the inhabitants of the city, the courts, at the instance of the latter, may declare the company's charges under the ordinance in fact unreasonable and excessive.[2]

The inhabitants of the city not being bound by such a contract, what are their rights with regard to it? They are not parties to the contract, the company has made no promise to them, and the provision as to rates cannot be appealed to as a legislative enactment. Whatever effect may be given such a provision where the city has power to legislate upon the subject of rates, in the class of cases now under consideration all the force which such a provision can have must depend upon its contractual character. The question presented, therefore, is the right of a third party to enforce a promise in a contract made for his benefit. The city council, in exacting the promise regarding maximum rates, is not seeking to discharge any legal obligation owing by the city to the individual inhabitants, nor has the city any pecuniary interest in the company's fulfilment of its promise. The individual citizens are, therefore, in the strictest sense, mere beneficiaries, and their right to sue for failure of the company to perform its promise as to rates can be supported only in those jurisdictions where the doctrine of "sole beneficiary" prevails.[3] No doubt the promise in these rate cases is expressly directed to, and is intended for the benefit of private users or consumers, and these cases may therefore be distinguished from those in which it has been held that a citizen cannot maintain an action against a water company on account of the destruction of his property by fire, by reason of the failure of the company to perform its promise to the city to furnish water at a certain pressure to the city fire department.

In those states, therefore, where the doctrine of "sole beneficiary" appears to be accepted, there would probably be no difficulty in allowing individual citizens to sue and recover damages by reason of any injuries received on account of the failure of the

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[1] Zanesville *v.* Gaslight Co., 47 Oh. St. 1, 31.

[2] Griffin *v.* Water Co., 122 N. C. 206.

[3] See Professor Williston's article, "Contracts for the Benefit of a Third Person," 15 HARV. L. REV. 767.

company to perform its agreement as to rates.[1] And a bill for an injunction by a private consumer, to prevent the shutting off of his supply of water or gas on account of a refusal to pay rates higher than the maximum fixed in the contract between the city and the company, has also been sustained on the ground that the injury threatened was such as demanded relief in equity.[2]

There is more difficulty with respect to allowing a remedy by mandamus, as it is well settled that mandamus is not available in case of an obligation merely contractual. And where mandamus has been allowed it is not always clear that the court did not intend to hold that the municipality had the power and did, in effect, legislate upon the subject of rates.[3] One view for sustaining mandamus in these cases has, however, been suggested. Parties engaged in a public service business are bound to serve the community without discrimination and at reasonable rates. Each person, therefore, entitled to the service has a right to demand it upon offering to pay a reasonable price, and a public service corporation, after agreeing upon a maximum rate in its contract with the city, may be held in no position to deny that any amount above the maximum was unreasonable.[4] Yet where a citizen chooses to rest his claim upon a right to a reasonable rate, and not upon his right as beneficiary under an express contract, certainly the company, as against him, ought to be able to show, if possible, that the maximum rate is unreasonably low. Moreover, a writ of mandamus to compel the company to serve a citizen at reasonable rates comes very close to asking the court to fix the rates. There is authority, however, that mandamus may be brought for that purpose.[5]

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[1] Adams *v.* Union R. R. Co., 21 R. I. 134; Gaedke *v.* Staten Island Midland R. R. Co., 43 N. Y. App. Div. 514.

[2] Westfield Gas & Milling Co. *v.* Mendenhall, 142 Ind. 538; Smith *v.* Birmingham Water Works Co., 104 Ala. 315.

In a Texas case (Cleburne Water Co. *v.* City of Cleburne, 35 S. W. Rep. 733) the company had made a contract with the city in which it agreed to charge private consumers of water not more than certain named rates. A bill for an injunction was prayed by the city to restrain the company from charging citizens more than the agreed rates. Relying upon a previous case to the effect that a citizen could not sue a water company on account of the loss of his property by fire, the court concluded that private consumers could not sue upon the promise of the company in this case, either, and held that, *therefore*, the bill by the city should be sustained.

[3] Richmond Railway & Electric Co. *v.* Brown, 97 Va. 26.

[4] People *v.* Suburban Railway Co., 178 Ill. 594, 606.

[5] People, *ex rel.* Brush *v.* New York Suburban Water Co., 38 N. Y. App. Div. 413.

II.

Now let us suppose that express power has been granted to the city to fix rates by an exercise of legislative power, and in that situation the city enters into a contract which contains a provision with respect to rates. What will be the force of the rate provision contained in such a contract?

In the case of Rogers Park Water Co. *v.* Fergus,[1] decided two years ago by the United States Supreme Court, it appears that by an act of the Illinois legislature passed in 1872, providing for the incorporation of cities and villages, the authorities of cities and villages were given power to construct waterworks "and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." By an ordinance passed in 1888 the village of Rogers Park "contracting with H. E. Keeler, his successors and assigns," sought to provide for a supply of water for the village. Keeler was granted the exclusive right for a period of thirty years of maintaining and operating a system of waterworks, and it was provided by section 12 of the ordinance that "the said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise," with an option as to charging meter rates. Then followed a schedule of maximum rates for uses specified. Keeler assigned to the Rogers Park Water Company. In 1893 the village of Rogers Park was annexed to the City of Chicago. In 1891, by a statute of the state of Illinois, municipalities were "empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished" by individuals or companies operating water works. In 1897 the city council of Chicago fixed by ordinance maximum charges for water which were less than the maximum rates in the Rogers Park ordinance of 1888. A writ of mandamus was brought by Fergus, an inhabitant of the town, to compel the Rogers Park Water Company to supply him with water at the rates fixed by the Chicago ordinance. A demurrer to the answer of the company was sustained by the Illinois courts, and the Supreme Court of the United States affirmed the judgment.

Mr. Justice McKenna, in delivering the opinion of the court,

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[1] 180 U. S. 624.

referred to a decision already rendered[1] to the effect that the Illinois statute of 1872, quoted above, did not give to municipalities power to grant for thirty years the right to charge particular rates agreed upon. The power to authorize the construction of water works "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years" was considered, so far as rates were concerned, to confer a power to legislate and not a power to contract. If the village did, therefore, intend, to grant to Keeler a right to charge for a period of thirty years up to the maximum rates named in the ordinance of 1888, that grant was without authority. The court, however, following the Illinois Supreme Court, held that the provision as to rates in that ordinance could not properly be considered as part of the contract, but rather as an exercise of the legislative power conferred upon the city, without any agreement that such power would not be exercised again during thirty years. So interpreted, the Rogers Park ordinance was in the form authorized by the legislature, and did not prevent the operation of the subsequent legislative regulation of rates by the city of Chicago.

It is submitted that the decision in this case might well be rested upon the ground suggested in connection with the cases already considered. Whether expressly authorized to regulate rates or not, the village of Rogers Park could certainly enter into the kind of contract actually made in this case, — an agreement fixing the maximum rates to be charged by the other party to the contract in consideration of the grant by the village of a right to use the public streets. Such an agreement, in the absence of a power in the village, as is held in this case, to contract away legislative control over rates, could not fairly be interpreted as having any other effect than to bind the water company not to charge more than the maximum rates named. The contract would therefore be subject to a subsequent exercise of the legislative power of the municipality reducing rates.

The view suggested would avoid the necessity of holding the rate provision included in the accepted ordinance a legislative enactment. And certainly, irrespective of the difficulty as to the intention of the parties, there are serious objections to holding such provisions contained in contracts acts of legislation. The provision has reference to the rates to be charged by the party to

[1] Freeport Water Co. *v.* Freeport, 180 U. S. 587.

the contract only, and if that party is bound, not because he has *agreed* to the provision, but because it is a law of the state, then certainly in many cases he might raise the objection that as legislation it is bad because special.

And now as to the situation of the municipal corporation itself. Suppose the municipality, in addition to being authorized to supply itself with water or gas is authorized to legislate upon the subject of rates charged by water or gas companies. Does that power to legislate in any way alter the effect of an agreement by a water or gas company to supply the municipal corporation at certain named rates? In this connection the important case for consideration is that of Freeport Water Co. *v.* Freeport City.[1]

In 1872 two statutes went into force in Illinois which conferred powers upon municipal corporations with reference to water supply. One, approved April 9, 1872, provided: "That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years. Any such city or village, so contracting, may levy and collect a tax . . . to pay for the water so supplied." The other statute, approved April 10, 1872, was the one already referred to in connection with the Rogers Park case, which, after providing that cities might construct waterworks, empowered city councils "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years."

In 1882 the city of Freeport enacted an ordinance giving to Nathan Shelton or his assigns exclusive right for thirty years to supply the city and its citizens with water. Section 7 of the ordinance provided that Shelton should erect fire hydrants and the city pay an agreed annual rental for said hydrants "during the full term specified in this ordinance." In 1891 a statute of Illinois empowered municipalities "to prescribe by ordinance maximum rates and charges for the supply of water furnished" by individuals or companies, and in 1896 the city of Freeport passed an ordinance which, amongst other things, reduced the annual rentals for fire hydrants to be paid to the Freeport Water Company, to whom Shelton's rights had been assigned. The Water Company brought

[1] 180 U. S. 587.

an action of assumpsit against the city for water furnished in 1896, and claimed that the ordinance of 1896 impaired the obligation of the contract of 1882. The U. S. Supreme Court, in affirming the judgment of the Illinois courts rendered against the contention of the water company, considered the statutes as "certainly ambiguous" with respect to the power over rates granted to the city, and, resolving that ambiguity in favor of the public and leaning also toward agreement with the decision of the state court, held that the city of Freeport did not have power to make, as it attempted, an irrevocable contract for thirty years fixing the rates to be paid by the city for that period.

We have here, then, a case in which it is held that a city, apparently having power to contract for a supply of water for a period of thirty years, yet has no power to agree upon the price it will pay for the water which the other party may supply to the city itself under the contract. The majority of the court, and the dissenting judges as well,[1] make no distinction whatever between the power of the city to make a contract agreeing to pay a certain price for water furnished to the city itself, and the power of the city, as was contended in the Rogers Park case, to bind itself by contract so that it may not during thirty years exercise its legislative power to reduce the rates charged to private consumers. Now admitting the correctness of the construction adopted by the court in the Rogers Park case, that the words "at such rates as may be fixed by ordinance" contained in the statute of April 10, 1872, gave to the city authority to regulate rates by the exercise of legislative power, and excluded the right of the city so to contract that it might not exercise that legislative power in the future, it by no means follows that the city did not have power to agree to pay a certain price for water to be furnished to the municipal corporation itself during a period of thirty years. Because, that is, the express power to regulate rates from time to time by legislation deprived the city of the right to contract away that legislative control, it did not also and necessarily follow that the city might not make a separate contract binding itself to receive and pay an agreed price for water agreed to be furnished to it in a particular way for a definite period. The same question as to the power granted cities and villages by the Illinois statutes did not arise in the Rogers Park case that was presented in the Freeport case,

[1] See the dissenting opinion in the Rogers Park case.

though the court, majority and dissenting judges alike, apparently regarded it as the same. In the one case the question was as to the power of the city to obligate itself not to reduce the rates to be charged private consumers; in the other as to the power of the municipality to obligate itself to pay an agreed price for water furnished the municipality itself. The obligations of both contracts, if valid, would be protected from impairment by the Constitution of the United States, but the obligations were not identical, and the question of the power to create them not the same.

And now as to the power of the city to make the contract in question in the present case. The first thing to be noticed is the difference in the powers given by the statute of April 9 and that of April 10, 1872. The statute of April 9 gives municipalities power to contract with water companies[1] that may then be already established, "for a supply of water for public use, for a period not exceeding thirty years." This clearly gives to cities and villages power to make a contract which shall bind the water company to furnish and the municipality to receive water for a period of thirty years. No express power to agree to pay for what the city was thus authorized to contract for could be required, and the statute makes no mention of any particular method of fixing the price. If the question in this case arose under this statute, dealing as it does merely with contracts made by the city for a supply of water to the municipality itself, there could hardly be any doubt of the power of the city to agree upon the price to be paid for the water furnished. But the statute of April 10, as is pointed out in the dissenting opinion, had reference to a different situation, and contemplated the establishment of a water system in cities and villages where none then existed, and evidently had in mind the needs of the inhabitants as well as of the municipal corporation. It was with reference to such a situation that the contract in question was made, and the case is decided finally upon the construction of the statute of April 10. That statute, in addition to authorizing municipalities to construct waterworks on their own account, gave them power "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty

[1] In the Freeport case the contract was not made directly with the water company, but through an individual who assigned to the company. In the Danville case (180 U. S. 619), the decision of which was controlled by the decision in the Freeport case, the contract was made directly with the company.

years." Now this statute does not in terms say anything about the right of the city by contract to bind itself to receive water for a period of thirty years; it merely gives to the city power to grant to a person or private corporation a right *to construct and maintain waterworks for a period of thirty years*, and a power to fix rates, as the court holds, by legislative ordinances. As regards contracting for a supply of water to meet its own requirements, this statute, so far as any express power is concerned, leaves the city where it was before. That is to say, whether the city might contract, with the person or corporation proposing to construct and maintain waterworks, for a supply of water to the city itself for a period of thirty years, was not determined by any of the express powers contained in the act of April 10.

Now there can be no doubt that an individual might, if he chose, contract for a supply of water for thirty years at an agreed price. He could not lawfully be deprived of his freedom to make such a contract.[1] Whether a municipality might make a similar contract to supply its own needs would depend upon its granted powers, and in the Freeport Water Company case the court holds that the city, whether or not it had power to bind itself to receive a definite supply of water for thirty years, at any rate had no power to agree to pay a fixed price for its supply for that period. The decision in this case, then, must mean that where a city, as is held in this and the Rogers Park case, has been granted legislative power, by means of which it may regulate the rates to be charged by a person or corporation proposing to construct and maintain waterworks, it may not enter into a contract binding itself to receive water from that person or corporation at an agreed price for a period of thirty years, and thereby deprive itself of the advantage of such subsequent legislative regulations of rates as the city council may itself enact under its delegated powers. In that case the only agreement as to rates which could be included in the ordinance granting the franchise would be an agreement fixing maximum rates to be charged by the company to the city and its various departments, as well as to private consumers. Such a provision, if accepted by the company, would be subject to further reduction by the legislative power delegated to the city

[1] Where the company is allowed to charge only such rates as may be fixed by the municipality, the validity of private contracts for a different rate would be another matter. See Osborne *v.* San Diego Land & Town Co., 178 U. S. 22 (the head-note is inaccurate), and San Diego Flume Co. *v.* Souther, 90 Fed. Rep. 164, 104 Fed. Rep. 706.

council, as was held in the Ohio case to which reference has already been made.[1] The curious thing is that if the city of Freeport had waited until the Freeport Water Company had become established, it might then, under the authority given by the act of April 9, have contracted "for a supply of water for public use for a period not exceeding thirty years," and that statute in no way indicates that the price to be paid could be such only as might be fixed by the legislative power of the city. That statute dealt specifically with the kind of contract made in the Freeport case, and if the city had authority in contracting for its own wants to anticipate the actual establishment of the corporation, and contract at the same time that it granted the franchise to operate, then the statute of April 9 would seem to indicate the kind of contract that might be made.

We may sum up, then, as follows. Where a city has been delegated authority to fix rates by ordinance, that may mean authority to fix rates by legislative enactment, and may exclude the power to contract away such legislative control. That is the Rogers Park Water Company case. The power to fix rates by ordinance may also be construed in some cases to mean that the city, in providing for its own needs, may not enter into an agreement which, if valid, would prevent it from taking advantage of subsequent legislative regulations of rate by the city council. The city, that is, being authorized to supply its own wants at such rates as may be fixed by legislative action of the city council, may not by contract deprive itself of the advantage of rates so fixed. That is the Freeport Water Company case.

III.

The decision in the Rogers Park case has shown that express authority granted to a city to fix rates by legislative enactment may be considered as excluding the power to bind by contract that right of legislative control. Now suppose the city is expressly directed by the legislature to fix rates by contract. What, then, will be the effect of a contract so made?

In the case of Detroit *v.* Detroit Citizens Street Railroad Co.,[2] recently decided by the United States Supreme Court, it appears that by the street railway act of Michigan, passed in 1867, under

[1] Zanesville *v.* Gaslight Co., 47 Oh. St. 1, 31.

[2] 184 U. S. 368.

which some of the companies owned by the appellee were organized, it was provided that the rate of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities." The ordinances of the city of Detroit, which were accepted by these companies, provided that the fare for any route named should not exceed five cents. The bill in the present case was filed by the railway company to restrain the enforcement of subsequent ordinances of the city of Detroit, passed in 1899, reducing the rates of fare below five cents for any one route, and providing for transfers from one route to another upon the payment of a single fare of five cents. The court held that the accepted ordinances constituted contracts between the railway companies and the city, and that the provision as to rates was an agreement by which the companies were bound to charge not more than five cents for the routes named, and were given the right, so far as any legislative power of the city to regulate rates was concerned, to charge at least that amount. The ordinance of 1899, therefore, impaired those contracts.

Unfortunately it is not stated in the opinion when the power to legislate upon the subject of rates was delegated to the city of Detroit.[1] That the city had such power in 1899 must be assumed. Otherwise there was no law impairing the obligation of contracts, and no federal question to be considered.[2] But it is not clear whether the court took the view that the city had this power to legislate at the time these contracts were made, or was delegated such power subsequently. The reference in Mr. Justice Peckham's statement of the case to the city's charter of 1883, which gave to the city a general power of control and regulation over the streets, may indicate that the court considered the power to legislate was given then, perhaps, for the first time. That was after the contracts were made. Moreover, Mr. Justice Peckham in delivering the opinion says: "It is plain the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities

[1] A similar ambiguity appears in the case of Cleveland City Railway Co. *v.* City of Cleveland, 94 Fed. Rep. 385.

[2] People's Gaslight & Coke Co. *v.* City of Chicago, 114 Fed. Rep. 384, 388. And compare Old Colony Trust Co. *v.* City of Atlanta, 83 Fed. Rep. 39.

under a delegated power from the legislature. It was made matter of agreement by the express command of the legislature." This may mean, however, not that the city did not at the time the contracts were made have a general power to legislate upon the subject of rates, but that it was directed to contract and not to legislate in this particular case. Having already, that is, a general power to regulate rates, it may be the court intended to hold that in this instance the city was expressly authorized to limit that power by contract; that it did, by the contracts as made, agree not to exercise that legislative power so as to reduce the rates of fare below the maximum named, and that the ordinance of 1899 was therefore an impairment of the obligations of those contracts.

Viewed in this way, the case would be similar to that of Los Angeles *v.* Los Angeles City Water Co.[1] In that case it appeared that the municipality possessed the power "to provide for supplying the city with water." It seems to have been conceded that this gave the city a right to regulate rates. In that situation the municipality, in 1868, leased to the assignors of the Los Angeles Water Company its system of waterworks for a term of thirty years, and granted a right to use the streets of the city for the purpose of operating the plant. The contract provided also "that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assignees, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water." Suit was brought by the Water Company to annul an ordinance passed by the city of Los Angeles in 1897 on the ground that it fixed rates at figures below those agreed upon in the contract of 1868. The ordinance was passed in pursuance of the California constitution of 1879, giving authority to cities to regulate water rates from year to year. Counsel for the city, admitting that the municipality in 1868 had a general power to regulate water rates, appear to have contended that the contract of 1868 had no reference to that power, and that the agreement that the city would not reduce rates below a certain figure did not bind its legislative power at all, but merely the municipality in its capacity of lessor and landlord. The court denied this contention, holding that the

[1] 177 U. S. 558.

contract was intended to bind the legislative power of the state as exercised by the city, that the question of the power of the city so to contract was closed by an act of the legislature in 1870 ratifying the contract, and that therefore the contract of 1868 was impaired by the subsequent legislation.

It is clear that if the city of Los Angeles did not possess a legislative power over water rates in 1868, then the contract reservation to the city of the right to regulate rates, provided they were not reduced below the figures named, could have merely the force of an ordinary contract provision as between lessor and lessee; but conceding the existence of the power to regulate rates, the contract was open to the construction placed upon it by the court, so that the power reserved was a power to legislate, and the power to reduce rates agreed not to be exercised beyond a certain point was a legislative power.

The contracts, therefore, in the Detroit Street Railway case and in the Los Angeles Water Company case have the same result, although in the one case there was merely the fixing of a maximum rate which the company was not to exceed, while in the other there was an express agreement by the city not to reduce rates below a certain point. Evidently the contract obligation that is protected from impairment is in both cases the same. Whether we say that the company has a right to charge private consumers up to the maximum, or that the city may not reduce the rates to private consumers below a certain point, in both cases we refer to an obligation imposed directly upon the city. If we say that the Detroit Street Railway Company has the right to charge passengers at least five cents, we do not mean that individual passengers have obligated themselves by contract to pay that fare, but that the city has agreed that, so far as its power to regulate rates is concerned, that power shall not be exercised to reduce rates below five cents. The only right affecting the company's charge to individuals which the city can grant to the company is a right to be free from the interference of the legislative power of the city. The municipality, when given authority, may contract to receive so much water or gas and pay so much for it, but it cannot agree how much individual citizens will take or how much they will contract to pay. That kind of agreement the individuals must make for themselves. The agreement, therefore, in the Detroit Street Railway case, which, as interpreted by the court, creates an obligation which would be impaired by a reduction of rates, must be similar to the

agreement contained in the Los Angeles Water Company case, and forbids an exercise of legislative power by the city, reducing rates below the amount named.

The further question then occurs, whether this result could properly be reached in the Detroit Street Railway case unless the city of Detroit, at the time the contracts in question were made, possessed power to legislate upon the subject of rates of fare? As we have already learned from the Rogers Park case, a power delegated to the city to regulate rates by legislation may not include a power to contract with reference thereto, and it may well appear strange, therefore, that a municipality could make a valid contract agreeing not to exercise such a legislative power even before any right to regulate rates had been delegated to it. On the other hand, the legislature, in directing that the matter of rates should be determined by agreement between the city and the company, may have intended that the company should secure a definite contract which could not later be modified by any action of the city at least. In that case, however, a clear expression of intention might well be required, and if the city at the time possessed no legislative power to regulate rates, it would be going far, certainly, to construe a legislative direction to the municipality to agree upon rates as conferring a power to contract away a right to regulate rates not yet granted to the city.

In case the city of Detroit, at the time it made these railway contracts, did not possess power to regulate rates of fare, one other explanation of the decision might be suggested. The court may have considered the "command" of the legislature contained in the Railway Act, to fix the rates of fare by contract, as authorizing the city, acting as representative of the state, to make a contract which should bind the power of the state over rates as possessed by the state legislature. Then when the legislature, in 1883, impliedly authorized the city to regulate rates, the city acquired that power to legislate coupled with the limitations contained in the previous contracts. There would appear to be no reason why the legislature might not authorize a city, which itself possessed no power to legislate upon the subject of rates, to make a bargain with respect to the future exercise of such legislative power by the legislature. But it is more than doubtful if the court in the Detroit Street Railway case can be regarded as so interpreting the contracts there in question. The statement in the opinion, "The legislature has not attempted to interfere

with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case," would appear sufficient to negative any suggestion that the court proceeded upon a theory which would necessarily require a holding that the power of the legislature to regulate rates was bound.

Might it not well be, it is submitted, that the contracts that the Michigan legislature authorized and expected the cities and villages to make, were exactly the kind of agreements actually made by the city of Detroit in these cases, — agreements fixing the maximum rate which the companies should charge in consideration of the right to use the streets? And might not that agreement be considered as made subject to, and not with the idea of limiting, the legislative power of the state reasonably to regulate the charges of public service corporations? Then the only question for determination in the present case would be whether the city had at any time been delegated legislative power over the subject of rates, and had properly exercised that power by the ordinance of 1899.[1] Even under the direction in the Railway Act that the rates should be fixed by agreement with the city, might not the city obtain for itself the most favorable agreement possible, and should the rule of construction applied to the interpretation of the ordinances be more unfavorable to the city in this case than in the Rogers Park case?

In conclusion, it may be well to notice two questions which have been suggested from time to time during the previous discussion,

[1] In People's Gaslight & Coke Co. *v.* City of Chicago, just decided by Judge Grosscup in the United States Circuit Court, seventh circuit (National Corporation Reporter, July 31, 1902), it appears that the Gas Company filed a bill to enjoin the enforcement of an ordinance of the city of Chicago, fixing the price of gas at seventy-five cents a thousand feet, on the ground that the ordinance impaired a contract between the state and the company. The Gas Consolidation Act of 1897, under which the present company operates, contains the following provision: "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger." It was contended that this gave the company a contract right to charge a price at least as high as that for the "year immediately preceding," which was not less than one dollar per thousand feet, and that the city could not by legislation reduce that price. The court held that the legislature did not undertake to agree upon an unalterable rate, but merely named a rate beyond which the company should not go, and that the case was therefore unlike the Detroit Street Railway case. It would appear, therefore, that the mere possession of a power to regulate rates and a power to contract will not render a contract provision fixing maximum rates an agreement that the legislative power shall not be again exercised to reduce those rates.

but which have not yet come to an express decision. The agreement in the Los Angeles case was that the municipality would not reduce rates below a certain point. The contract by its terms bound the city only. Did that mean that the legislative power of the state, only as delegated to and exercised by the city, should not be employed to reduce rates, and that the power of the state legislature was in no way bound? The Supreme Court in that case referred to the objection of counsel that the city had no power to bind the state, and held it as settled that the state might authorize the city so to bind it, and that the city was so authorized in that case. It is not clear, however, in just what respect, if at all, the court was there intending to hold the state bound. In the opinion of the Circuit Court in the same case[1] we find this language used :

"The parties manifestly intended by the clause now under consideration that the lessees should have a right to the minimum rates prescribed, namely, the rates that were then charged ; and, if the city was authorized to make such an agreement, neither it *nor the legislature of the state* could thereafter lawfully reduce the rates below the minimum so agreed upon."

This, once more, would appear to be confusing the contract obligation not to legislate with the obligation of the city or an individual to pay a certain price agreed upon. The valid obligation of the city or individual to pay the agreed price would be protected from subsequent legislative regulation of either state legislature or city council. But the question here is as to the promise of the city not to reduce rates charged private consumers, and whether the subsequent regulation of rates by the state legislature would in any way impair the obligation of that contract. In this connection the language already quoted from the last case on this subject decided by the Supreme Court, the Detroit Street Railway case, is significant. The court in that case, although holding that an attempted reduction of rates by the city would impair the obligation of the earlier contracts, expressly refrained from giving any opinion as to the power of the legislature to alter the rates. It may be safe to conclude, therefore, that, although the legislature might authorize the city to bind the legislature as well as the city council, yet the authority given, or the contract actually made by the city, might be such as would bind the city

[1] 88 Fed. Rep. 720, 729.

only and leave the power of the state legislature to regulate rates free.

One further point may finally be noticed with reference to the necessity of distinguishing between a contract by a city to pay an agreed price for some commodity furnished to the municipality itself, and a contract by a city with reference to the exercise of its legislative power over rates. When the city or an individual citizen has made a valid contract agreeing to pay a definite price for water or gas to be furnished such city or individual, all question of the reasonableness of the price so agreed upon is closed between the parties during the period of the contract. But when the city, in its contract with the company, undertakes to name the rates which the company may charge private consumers, or agrees not to reduce those rates by legislation, are private consumers prevented during the term of that contract from questioning the reasonableness of the rates charged them?

In the case of Santa Ana Water Co. *v.* Town of San Buenaventura[1] it appears that in 1869 the town authorities made a contract with certain parties providing for a supply of water for the town and its inhabitants, granting a right to use the streets of the town, and providing also that such parties "shall have the unrestrained right to establish such rates for the supply of water to private persons as they may deem expedient, provided that such rates be general." An ordinance of the town passed in 1892, fixing the rates to be charged to the inhabitants, was held an impairment of the obligation of the contract. So far, that is, as the city's legislative power was concerned, the Water Company had a right to fix its own rates. It was no longer for the city to say what was reasonable. Whether the rates charged by the company were reasonable or unreasonable, the legislative power of the city was bound by the contract not to interfere. But did that mean that the individual citizens themselves might not appeal to the courts if the rates were in fact unreasonable, and that the courts could not consider the question of reasonableness?

If it be true, as was stated by Mr. Justice Brewer in Reagan *v.* Farmers' Loan & Trust Co.,[2] that the province of the courts to inquire as to the reasonableness of rates is not altered because the legislature has prescribed the rates, then the existence of a contract binding the legislature or city council not to reduce rates

[1] 56 Fed. Rep. 339.

[2] 154 U. S. 362.

below a certain point would not limit the jurisdiction of the courts to inquire as to the reasonableness of the rates charged individuals. If the jurisdiction of the courts, however, in the protection of citizens against unreasonable charges, is limited to those cases in which the legislative power of the state has not been exercised, or has been exercised improperly, then the right of the courts to interfere, in a case where a city has agreed that the rates shall not be reduced below a certain point, would be more questionable.

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CHICAGO.